No. 07-71576

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA ENERGY COMMISSION, Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al., Respondents

APPEAL OF ADMINISTRATIVE ACTION
BY RESPONDENTS UNITED STATES DEPARTMENT OF ENERGY, et al.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Page

FEDERAL STATUTES AND LEGISLATIVE HISTORY

CALIFORNIA STATUTES AND LEGISLATIVE HISTORY

Page

FEDERAL REGULATIONS

FEDERAL REGISTER

CALIFORNIA STATE REGULATIONS

INTRODUCTION

Petitioner California Energy Commission ("CEC") petitioned Respondent United States Department of Energy ("DOE") for a waiver of federal preemption for the State's water efficiency standards for residential clothes washers ("RCW"). DOE denied the petition. In so doing, DOE misread the law and mischaracterized the record. This Court has jurisdiction to overturn DOE's arbitrary and capricious action and should remand to the agency with instructions to grant the waiver.

I. This Court Has Jurisdiction to Review DOE's Appliance Rulemaking Decisions.

We have previously addressed jurisdiction in our response to DOE's motion to dismiss. In addition, we note the following.

The judicial review provisions of the Energy Policy and Conservation Act ("EPCA") cover only some of DOE's appliance activities. The district courts are expressly given jurisdiction over suits concerning federal agency noncompliance with nondiscretionary duties, state compliance with EPCA, and DOE's denial of a petition to begin a rulemaking for a new federal standard. 42 U.S.C. §§ 6305(a)(2)-(3), 6306(c).[1] The courts of appeals are expressly given jurisdiction over suits filed by persons "adversely affected by a rule prescribed under section 6293, 6294, or 6295." § 6306(b)(1). For all other DOE actions – such as the

[1] Section citations are to 42 U.S.C. unless otherwise noted.

waiver decision under § 6297(d) challenged here – EPCA's judicial review provisions are silent.

DOE claims that judicial review over agency decisions is in the district courts, unless Congress has expressly placed jurisdiction in the courts of appeals. DOE Br. 18.[2] This argument conflicts with the only judicial decision dealing with EPCA's judicial review provisions, *NRDC v. Abraham*, 355 F.3d 179, 193 (2nd Cir. 2004) ("*NRDC v. Abraham*") (applying §§ 6305 & 6306). The court stated that "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals." *Id.* (citation omitted).

DOE's argument also conflicts with the principle that "statutes authorizing review of specified agency actions should be construed to allow review of agency actions which are functionally similar or tantamount to those specified actions." *Thermalkem, Inc. v. EPA*, 25 F.3d 1233, 1237 (3d Cir. 1994). Here, DOE's grant or denial of a preemption waiver for a state standard, under § 6297(d), is "tantamount to" modifying or reaffirming the preemptive effect of the federal

[2] Most arguments in the briefs of Intervenor Association of Home Appliance Manufacturers ("AHAM") and Amici Curiae Gas Appliance Manufacturers Association and Air-Conditioning and Refrigeration Institute ("GAMA-ARI") repeat arguments in DOE's brief. We cite the former only where they raise different points.

efficiency standards adopted under § 6295. Section 6297(d) rulemakings are therefore "functionally similar" to § 6295 rulemaking responsibilities, which EPCA expressly assigns to the courts of appeals, and both should be reviewed in the same court. Indeed, when a state's waiver request is denied, the state becomes a "person adversely affected by a [standard] prescribed under section . . . 6295," and therefore eligible to seek review in the courts of appeals. § 6306(b)(1).

Moreover, "sound policy" favors court of appeals review of agency decisions that are based upon a record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985) ("*Lorion*"). Applying that policy to EPCA, the court in *NRDC v. Abraham* determined that DOE's decisions to delay the effective dates of § 6295 standards should be reviewed by the courts of appeal, despite EPCA's silence about jurisdiction over such decisions. The court explained that such decisions were "in the nature of rulemaking proceedings," "would not require additional factfinding," and were "tantamount to an amendment or rescission of [§ 6295] standards, which clearly falls within section 6306(b)(1)'s ambit [of judicial review by the courts of appeals]." 355 F.3d at 194 (citations omitted).

DOE attempts to avoid the applicability of *NRDC v. Abraham* by noting, correctly, that the case does not deal with a § 6297(d) waiver proceeding. DOE Br. 23-24. But the principles are the same. Section 6297(d) proceedings are "in the

nature of rulemaking proceedings," 355 F.3d at 194 (they *are* rulemaking proceedings, § 6297(d)); they do not require any additional factfinding by a court, for review is confined to the DOE record, *see Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (citing, *e.g.*, *Lorion*, 470 U.S. at 743-44); and they are "tantamount to an amendment," 355 F.3d at 194, of § 6295 standards if a waiver is granted, or to reaffirmations of the preemptive effect of § 6295 standards if a waiver is denied.

Considerations of judicial economy also apply here. If this Court refused jurisdiction, the suit would be heard in district court. The district court would examine DOE's rulemaking record and assess whether the agency abused its discretion, followed applicable procedures, and based its findings on substantial evidence in the record. *See* 5 U.S.C. § 706; 42 U.S.C. § 6306(b)(2). The losing party would undoubtedly appeal to this Court, which in de novo review would conduct exactly the same inquiry as the district court's. *See Nat'l Medical Enterprises v. Sullivan*, 957 F.2d 664, 667 (9th Cir. 1992). Thus there would be two court proceedings dealing with the same issues and applying the same standard of review to the same record, needlessly wasting the courts' and the parties' resources, and delaying final resolution of the issues. *See Lorion*, 470 U.S. at 740-41; *Maier v. EPA*, 114 F.3d 1032, 1038 n.10 (10th Cir. 1997) (where agency has already compiled record, "there is no practical reason to submit the issues to two-

tiered judicial review").

The cases cited by DOE in its motion to dismiss do not support its position. See Response of [CEC] in Opposition to [DOE's] Motion to Dismiss 14-15 (June 18, 2007). In its brief, DOE relies most heavily on *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C.Cir. 2007). But that case bolsters the rationale for placing jurisdiction over § 6297(d) waiver petitions in the courts of appeals. *Public Citizen* held that NHTSA's decision not to *begin* a rulemaking proceeding was not reviewable in the courts of appeals. Just so, EPCA expressly assigns to the district courts review of DOE's denial of a petition to begin a rulemaking proceeding. § 6306(c)(2). In contrast, DOE's action (whether grant or denial) on a waiver petition is analogous to DOE's determination, at the end of a rulemaking proceeding, to establish (or not) a federal appliance standard, judicial review of which EPCA expressly assigns to the courts of appeals. § 6306(b)(1). This Court has jurisdiction to review both.

II. DOE's Denial of California's Waiver Petition Was Arbitrary and Capricious.

A. The Data and Analyses Were Adequate.

DOE's rationale for denying the waiver is California's alleged "failure to provide adequate information to DOE to allow the federal agency to make an informed decision." DOE Br. 24; see also *id. passim*. In particular, DOE claims

that California did not adequately support its analyses of the costs and benefits of the Standards, and their preferability to alternatives. *E.g.*, *id.* 11-12, 30-31. More generally, DOE complains that "CEC submit[ted] a minimal petition, without including underlying data," *id.* 29, and even asserts that "CEC has at every turn defied DOE's reasonable requests for the information supporting CEC's analysis and assertions," *id.* 47. DOE misstates the law and the facts.

1. Having Accepted the Petition as "Containing Sufficient Information," DOE Improperly Denied the Petition on the Ground That It Allegedly "Fail[ed] To Provide Adequate Information."

California submitted its waiver petition to DOE on September 16, 2005. 71 Fed. Reg. 6022, 6023 (Feb. 6, 2006), Petitioner's Excerpts of Record ("Pet'r's Excerpts") 0155; Letter from Jonathan Blees, CEC ("Blees"), to Douglas Faulkner, DOE ("Faulkner") (Sept. 13, 2005), Pet'r's Excerpts 0056. DOE's regulations provide that the agency has 15 days after receipt of a waiver petition to determine whether it "contain[s] sufficient information for the purposes of a substantive decision." 10 C.F.R. § 430.42(f)(1). On November 18, 2005 DOE determined that California's petition was complete, save only for a "statement . . . on whether 'the same or related issue, act or transaction has been or presently is being considered or investigated by any State agency, department, or instrumentality' . . . ." *See* 71 Fed. Reg. at 6023 (quoting 10 C.F.R. § 420.42(c)), Pet'r's Excerpts 0155; Letter

from Faulkner to Blees (Nov. 18, 2005), Pet'r's Excerpts 0159. California promptly submitted the missing information (answering "no"). Thereupon DOE "determined that the regulatory requirements have been met," letter from Faulkner to Blees, (Dec. 23, 2005), Pet'r's Excerpts 0158, and accepted the waiver petition "as complete," 71 Fed. Reg. at 78160, Pet'r's Excerpts 0142. *See also* 71 Fed. Reg. at 6023, Pet'r's Excerpts 0155.

DOE then took a year to consider the Petition's merits. On February 6, 2006, DOE published a notice establishing a 60-day comment period on issues such as:

> Is the analysis used in the California Petition *accurate*? For example, are the State's savings estimates *correct*? How *valid* are the State's assumptions?

71 Fed. Reg. at 6025 (emphasis added), Pet'r's Excerpts 0157. Those questions make no sense if DOE believed, as it later stated, that the Petition "did not provide sufficient explanation of the underlying assumptions and data," *id.* at 78163, Pet'r's Excerpts 0145. In addition, DOE's notice explained that California had provided a link to the entire record of the CEC rulemaking in which the RCW Standards had been adopted: "[m]aterial related to this State regulation is available at the following URL address . . . : www.energy.ca.gov/appliances/2003rulemaking/clothes_washers/index.html." 71 Fed Reg. at 6023, Pet'r's Excerpts 0155. DOE's later assertion that the CEC "did

not indicate where [the Energy Commission's] rulemaking record could be located," 71 Fed. Reg. at 78163, Pet'r's Excerpts 0145, is inexplicable.[3]

DOE received more than 70 comments, most from water districts (and associations of water districts) providing additional information about the benefits of the Standards, their preferability to alternatives, and other matters. *See* http://www.eere.energy.gov/buildings/appliance_standards/state_petitions.html (DOE's rulemaking website). No comment indicated that the data or analyses in the California Petition were "[i]nadequate . . . to allow [DOE] to make an informed decision," see DOE Br. 24.

After the comment period ended, DOE invited the CEC to rebut, as required by § 6297(d)(2). Letter from Richard F. Moorer, DOE, to Blees (Apr. 14, 2006), Pet'r's Excerpts 0153. The letter did not mention any perceived inadequacies in the data or analyses that had been submitted. The CEC submitted rebuttal comments on May 15, 2006. Rebuttal Comments of the [CEC] ("Rebuttal"), Pet'r's Excerpts 0032-0052.

[3] Despite AHAM's claim to the contrary, AHAM Br. 23-25, 29-30, California has never claimed that its rulemaking record is part of DOE's record. For the convenience of DOE and participants in DOE's proceeding, California referenced its rulemaking record, and anyone who thought that additional information was necessary or would be helpful could have had it or asked the CEC for assistance in locating it. No such inquiry came.

EPCA's six-month review period for waiver petitions was scheduled to end on June 23, 2006. *See* 71 Fed. Reg. 35419 (June 20, 2006), Pet'r's Excerpts 0151. On June 20, 2006, DOE granted itself the six-month extension provided by EPCA, and established December 28, 2006 as the final decision date. *Id.* Again, DOE gave no indication that it believed that the data or analyses were unsupported or otherwise inadequate. Indeed, DOE appeared to believe the opposite:

> [DOE] extends the period for *evaluation* of the California Petition . . . in order to provide [DOE] adequate time to *evaluate* the petition in light of public comments and CEC rebuttal comments received. [DOE] will *consider the information and views submitted* and *make a determination* on the California Petition.

Id. at 35420 (emphasis added), Pet'r's Excerpts 0152. DOE was silent for the next six months.

On December 28, 2006, DOE denied the petition. DOE did not, however, "make a determination on the California Petition," 71 Fed. Reg. at 35420, Pet'r's Excerpts 0152. Rather, although the agency claims to have "identified three independent reasons" for the denial, DOE acknowledges that "each . . . flowed from CEC's failure to provide adequate information to DOE to allow the federal agency to make an informed decision." DOE Br. 24.

Because DOE requires submittal of a request for reconsideration in order to exhaust administrative remedies, 10 C.F.R. § 430.48(d), the CEC submitted a

request on January 29, 2007. The request specifically explained where the record contained the information that DOE had alleged (for the first time in the Decision) was lacking.[4] Request for Reconsideration ("Reconsideration") 6-7, Pet'r's Excerpts 0011-0012. In response, DOE was again silent, and the request was denied by operation of law. 10 C.F.R. § 430.48(c); *see* Pet'r's Excerpts 304. This litigation followed.

To summarize: In its first determination of the proceeding, DOE concluded that California's waiver petition "contain[ed] sufficient information for the purposes of a substantive decision." 10 C.F.R. § 430.42(f)(1). During the ensuing year-long rulemaking proceeding, DOE was silent about any potential inadequacies in data, analyses, or support therefor. In its final determination of the proceeding, DOE denied the petition on the ground that the record – including not only the Petition itself, but also the more than 60 comments supporting the petition

[4] For example, the CEC directed DOE's attention to a study conducted by Pacific Gas and Electric Company ("PG&E"), which provided analytic support for the RCW Standards during the California rulemaking. Reconsideration 8-9, Pet'r's Excerpts 0013-0014. (Thus DOE's claim, DOE Br. 32-33, that the CEC did not mention the study until our Opening Brief, is wrong.) Not surprisingly, counsel for DOE now asserts that the PG&E study lacks a sufficient explanation of its "values and assumptions." DOE Br. 33 n.9. Apparently, DOE would have state waiver petitioners engage in an endless process of justifying the principles that underlie the studies that back up the assumptions that support the data that feed into the analyses – with DOE concocting new requirements after each cycle. By the fourth or fifth round of this, the agency will be asking states to justify the basic axioms of arithmetic.

– "failed to provide adequate information to DOE to allow the federal agency to make an informed decision." DOE Br. 24.

DOE's action was arbitrary and capricious and should be overturned. Agencies must adhere to their regulations, policies, and processes. *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004). While an agency is entitled to change its mind, it should do so only if it follows applicable procedures, bases its determination on the record, and provides a reasoned analysis for so doing. *See California v. FCC*, 39 F.3d 919, 925 (9th. Cir. 1994), *cert. denied*, 514 U.S. 1050; *N. Cal. Power Agency v. FERC*, 37 F.3d 1517, 1522 (D.C. Cir. 1994) (citation omitted). There is no justification for DOE's about-face here.

2. California Met Its Burden of Proof.

The Court should disregard DOE's attempt to dress up its "inadequate data" determination in "burden of proof" clothes. See DOE Br. 38. DOE's merits arguments (1) begin by asserting that "each" of the agency's rationales "flowed from CEC's failure to provide adequate information," DOE Br. 24; (2) end by asserting that "CEC did not submit or identify the underlying data for DOE to review," DOE Br. 45-46; and (3) in between make more than a dozen claims about the agency's alleged inability to make a determination. DOE Br. 3-46.

If DOE is now arguing that California had a burden to show expressly that every single data point, assumption, and analytic method was accurate, DOE is wrong. No such requirement is in the law; indeed, Congress declined to impose any specific methodology on the states. H.R. Rep. No. 100-1, at 25 (1987) ("H.R. Rep."). It was sufficient for California to provide substantial evidence on each of the applicable statutory criteria. *See James City County, Va. v. EPA*, 12 F.3d 1330, 1338 n.4 (4th Cir. 1993). California did so. The CEC submitted a 49-page, single-spaced petition that described water needs, analyzed cost-effectiveness, compared alternatives, and assessed industry and consumer impacts. Pet'r's Excerpts 0056-0110. Even standing alone, this was adequate to meet California's "preponderance of the evidence" burden of proof, *see* § 6297(d)(1)(B). Opponents of the waiver had an opportunity to dispute any assumption or analytic method used in the petition. No one complained about inadequate data or support, and evidence submitted by supporters of the waiver, and CEC's rebuttal evidence, showed that opponents' substantive comments were irrelevant, unjustified, or even supportive of California's positions. *E.g.*, Rebuttal 3-14, Pet'r's Excerpts 0035-0046. If DOE believed that the record showed that any data, assumptions, or analytic methods were invalid, it could have and should have made such a determination. (DOE could have, for example, compared California's data and assumptions to those used

by DOE in its own recent clothes washer rulemaking. *See* Pet. 20 n.59, 32, 38 n.88, 40, 46 n.101, Pet'r's Excerpts 0081, 0093, 0099, 0101, 0107.) However, DOE chose not to do that, and instead merely demanded that California supply more, and unspecified, information. (In contrast is California's detailed explanation of the substantive flaws in industry comments. *E.g.*, Reconsideration 7-9, Pet'r's Excerpts 12-14; see also Rebuttal 3-14, Pet'r's Excerpts 0035-0046.)

AHAM's analogy highlights the difference between a burden of proof decision, which DOE did not make, and the "inadequate data" decision that DOE did make:

> Many high school seniors would be delighted to learn that the confirmation letter indicating that a complete application has been filed means that they have been admitted to every college to which they submitted a complete application.

AHAM Br. 23. No doubt those seniors would know that it would be arbitrary and capricious for a college, having "indicat[ed] that a complete application has been filed," *id.*, to deny the application because of its alleged "failure to provide adequate information . . . to allow the [college] to make an informed decision," DOE Br. 24. It would be proper for a college to reject an applicant because other applications were superior, just as DOE might have found that its record showed that California's Standards did not deserve a waiver, but DOE did not do that. It

just said there was not "adequate" information to make any findings at all – thereby, see pp. 6-11 *supra*, improperly reversing its initial determination.

3. The Cost-Benefit Analysis Was Adequate.

DOE claims that California failed to say where a cost-benefit analysis of the RCW Standards was located and to support the analysis. DOE Br. 11-12. Both claims are false and unsupported by the record.

Although EPCA does not require a "cost-benefit" analysis per se, *see* § 6297(d)(1)(C)(i)-(ii), California's petition contains eight pages describing the costs and benefits of the 8.5 and 6.0 Water Factor ("WF") Standards, both for individuals and for the entire state. Pet. 19-26, Pet'r's Excerpts 0080-0087.[5] The table on the following page of this Brief, reprinted from page 21 of the petition, Pet'r's Excerpts 0082, shows the cost-effectiveness of the 6.0 WF Standards for consumers. It also expressly describes the supporting data and assumptions.

[5] AHAM insinuates that the CEC did not conduct a cost-effectiveness analysis or feasibility assessment in the California rulemaking. See AHAM Br. 21. Wrong. See Pet. 19-20, Pet'r's Excerpts 0080-0081. Also mistaken are DOE's references to the RCW Standards as "proposed." DOE Br. *passim*. They are California law. Cal. Code Regs. tit. 20, § 1605.2(p)(1).

Assumptions and Inputs:

Cost of Base Case (10.5 WF) RCW: $ 550 Cost of 8.5 WF RCW: $ 616.44 Cost of 6.0 WF RCW: $ 680.18
Number of Wash Loads Per Year: 392 Average Life of RCW: 14 years
Water Price: $ 0.0032 per gallon Electricity Price:$ 0.115 per kWh Gas Price: $ 0.63 per therm
Electricity Savings for 8.5 WF standard:
Consumer Savings of 13 kWh/year/machine
Statewide Savings includes additional 14.5 kWh/year/machine for water pumping and water treatment
Electricity Savings for 6.0 WF standard:
Consumer Savings of 18 kWh/year/machine
Statewide Savings includes additional 21.7 kWh/year/machine for water pumping and water treatment
Discount Rate: 3 percent Annual California Sales of RCW: 900,000 units

TABLE 3: SAVINGS FOR THE INDIVIDUAL CALIFORNIA CONSUMER: 6.0 WF STANDARDS (EFFECTIVE 2010)

	Water Savings (gallons)	Electricity Savings (kWh)	Gas Savings (therms)	Water $ Savings	Electricity $ Savings	Gas $ Savings	Total $ Savings	Increased First Cost	Net $ Savings (Total Savings Minus Increased First Cost)
Annual Savings	**5,292**	**18**	**4**	**$ 16.93**	**$ 2.07**	**$ 2.52**	**$ 21.52**	**NA**	**NA**
Savings During 14-Year Appliance Lifetime ($ in present value)	**74,088**	**252**	**56**	**$ 191.00**	**$ 23.28**	**$ 28.47**	**$ 242.85**	**$ 130.18**	**$ 112.67**

California further demonstrated, throughout DOE's proceeding, that the State's cost estimates (and other data and assumptions) not only were reasonable but also were consistent with estimates made by manufacturers, retailers, and DOE itself. *E.g.*, Pet. 19-20, Pet'r's Excerpts 80-81; Reconsideration 7-9, Pet'r's Excerpts 12-14; Rebuttal 2 & n.9, 15, Pet'r's Excerpts 0041, 0047 ("[t]he washer's total energy and water savings can pay for the initial cost of the washer over its life" – from General Electric). Moreover, California's water districts and other supporters of efficiency stated clearly that the Standards are cost-effective. *E.g.*, Pet'r's Excerpts 0219 (California Urban Water Conservation Council ("CUWCC")), 0237 (PG&E), 0249 (Los Angeles Department of Water and Power), 0253 (Association of California Water Agencies ("ACWA")), 0265 (California Municipal Utilities Association ("CMUA")).

DOE specifically questioned only one single part of California's analysis, asserting that the CEC did not adequately support its estimates of the Standards' effects on clothes washer costs. 71 Fed. Reg. at 78163, Pet'r's Excerpts 0145. But this is not true. The petition contains extensive explanations, Pet. 19-20, 30 n.74, 38-40, Pet'r's Excerpts 0080-0081, 0091, 0099-0101, as does the CEC's rebuttal, Rebuttal 2 & n.6, 9-10, Pet'r's Excerpts 0034, 0041-0042. The CEC's request for reconsideration points out still other parts of the record that confirm the CEC's analysis. Reconsideration 7-9, Pet'r's Excerpts 0012-0014.

In its Brief, DOE now claims that "a petition for waiver must include market trend data" and must use "averages" for "values from possible ranges." DOE Br. 28, 33 n.9. These improper post hoc rationalizations, *see Burlington Truck Lines v. U.S.*, 371 U.S. 156, 158 (1962), are found nowhere in the law and are inconsistent with Congress's statement that EPCA "does not require the State to use any specific methodology," H.R. Rep. at 25.

DOE is an experienced and sophisticated agency that knows how to establish detailed requirements for assessing cost-effectiveness: the agency has adopted extensive protocols for the rulemakings in which federal efficiency standards are considered. 10 C.F.R. Part 430, Appendix A to Subpart C – Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, Items 4.(a)-(b), 4.(d), 5.(b)-(c), 5.(e)-(f), 9.-13. The protocols contain more than six pages – in small type – of instructions on analytic methods, data, and assumptions. To take just a few:

> DOE, in consultation with outside experts, will select the specific engineering analysis tools (or multiple tools, if necessary to address uncertainty) to be used in the analysis of the design options identified as a result of the screening analysis.
>
> [DOE will analyze] significant adverse impacts on a significant subgroup of consumers (including low-income consumers).
>
> [DOE will analyze] [v]ariable cost impacts on particular types of manufacturers, considering factors such as atypical sunk costs.

> Product-specific energy-efficiency trends . . . will be based on a combination of the efficiency trends forecast by the [Energy Information Administration's] residential and commercial demand model of the National Energy Modeling System (NEMS) and product-specific assessments by DOE and its contractors with input from interested parties.

Id., Items 4.(b)(1), 5.(e)(3)(G), 10.(d)(3), 13.(c). DOE's failure to establish such detailed procedures for state waiver petitions is telling. The requirements for waiver petitions state, in their entirety:

> A petition from a State for a rule for exemption from preemption shall include . . . .
>
> (i) The name, address, and telephone number of the petitioner;
>
> (ii) A copy of the State standard for which a rule exempting such standard is sought;
>
> (iii) A copy of the State's energy plan or water plan and forecast;
>
> (iv) Specification of each type or class of covered product for which a rule exempting a standard is sought;
>
> (v) Other information, if any, believed to be pertinent by the petitioner; and
>
> (vi) Such other information as the Secretary may require.[6]

10 C.F.R. § 430.41(a)(1). That's it. No "multiple tools . . . to address uncertainty," no "atypical sunk costs," no "efficiency trends forecast by" the EIA's NEMS model. Just a few simple lines, consistent with Congress's directive that

[6] Until the final Decision DOE never "require[d]" or even requested any "other information," and even then the agency did so only in extraordinarily vague terms. See pp. 6-11 *supra*.

states are free to choose their own methodologies. *See* H.R. Rep. No. 100-11, at 25 (1987). California complied with all the applicable requirements, and the record supports California's conclusion that the RCW Standards are cost-effective.

4. The Alternatives Analysis Was Adequate.

DOE claims that states seeking waivers must analyze state-specific, product-specific, water- or energy-specific alternatives to standards, DOE Br. 34-36, and that California failed to analyze such alternatives, *id.* 12, 16, 33-34. The law contradicts the first claim and the record contradicts the second.

EPCA requires that a state show that:

> the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

§ 6297(d)(1)(C)(i)-(ii). There is nothing requiring that any particular types of alternatives must be considered (other than reliance on the market alone). Indeed, Congress's specific requirement that one alternative (reliance on the market) be specific to "all products subject to the State regulation," *id.*, indicates that Congress did not intend to require that any other alternative be product- or state-specific. *See Case v. Kelly*, 133 U.S. 21 (1890). In fact, the law simply

"require[s] the State to show that it has engaged in a rational planning process in which the State has reviewed the cost-effectiveness of various alternatives to State appliance standards." *See* H.R. Rep. No. 100-11, at 25 (1987). This California did. See pp. 21-22 *infra*.[7]

DOE's argument that its "interpretation" deserves *Chevron* deference, DOE Br. 34-36, might have some plausibility if the agency had announced the interpretation before California filed its Petition. However, once DOE had decided that the Petition was "complete" and "contain[ed] sufficient information for the purposes of a substantive decision" under the agency's regulations, it was arbitrary and capricious for DOE to create additional requirements, as it has done both in the Decision and in its brief. See pp. 10-11 *supra*.

Moreover, the record does contain an extensive analysis of state-specific, product-specific, and water-specific alternatives. For example, California's

[7] In light of our arguments here, and those in our rebuttal and request for reconsideration, DOE is way off base in stating that "CEC hangs its entire argument" concerning alternatives on "[t]he term 'production'," DOE Br. 36. Equally erroneous is DOE's statement that "CEC does not dispute that DOE interpreted the statute reasonably with respect to comparisons concerning 'water savings,' which is the only issue in this case," *id.* We are not sure what this means, but we opposed DOE's interpretations of alternatives requirements in our reconsideration request and we do so now, and water savings is not the only issue: water production, energy savings, economic savings, environmental protection, and conservation of scarce resources are all relevant issues addressed in DOE's record. *E.g.*, Pet. 1, 3-5, 9, 13-19, 25-26, Pet'r's Excerpts 0062, 0064-66, 0070, 0074-80, 0086-87.

petition demonstrates that all feasible in-state water production alternatives are either fully utilized or prohibitively expensive: the State Water Project, groundwater, new storage, major in-state rivers (Trinity, Sacramento, San Joaquin, and Owens), water transfers, and desalination. Pet. 11-12, 27-34, Pet'r's Excerpts 0072-0073, 0088-0095; see also Rebuttal 6-8, Pet'r's Excerpts 0038-0040; Reconsideration 11-13, Pet'r's Excerpts 0016-0018.

The petition also discusses many in-state, RCW-specific water savings alternatives: rebates, consumer education, early replacement, mass government purchases, low income and senior subsidies, consumer tax credits, and reliance on the market. Pet. 26-36, Pet'r's Excerpts 0087-0098. The petition shows that rebates – the preferred alternative of the clothes washer industry, see AHAM Resp. to Pet. 13-15, Pet'r's Excerpts 0178-0080 – could not, even with enhanced consumer education, come close to matching the savings from the Standards, and would be substantially more expensive. Pet. 27-32, Pet'r's Excerpts 0088-0093. The petition also showed that all non-standards programs combined would likely achieve less than 10 percent of the savings from the Standards. *Id.* 32-34, Pet'r's Excerpts 0093-0095.

In addition, water districts and their associations discussed still more alternatives – some product-specific, some not, and all in-state – and concluded

that while many are useful, the California RCW standards are still "necessary," § 6297(d)(1)(C)(ii). For example, ACWA, representing almost 450 water agencies that deliver over 90 percent of California's water, stated that "[i]mproving the efficiency of clothes washers is only part of the overall solution for reliable water supply, yet it is a vital part [and] will not supplant other cost effective water conservation efforts . . . ." Pet'r's Excerpts 0253-0054 (ACWA); *see also* Reconsideration 12-13, Pet'r's Excerpts 0017-0018 (quoting water district comments on alternatives).

This evidence was quite sufficient to show that the RCW Standards are "preferable or necessary when measured against" alternatives. § 6297(d)(1)(C)(ii). DOE's claim that California failed to analyze in-state, water-specific, product-specific alternatives is flatly contradicted by the record. California's conclusion that certain alternatives are inferior is admittedly based on a DOE analysis dealing with national programs for energy-saving clothes washers. That analysis showed that such programs could save only a small fraction of the energy that mandatory standards would save. Pet. 32, Pet'r's Excerpts 0093. Nothing in the law prevents California from making the rational conclusion that the same types of programs, when applied in the nation's largest state, to water savings for the same appliance, would be similarly ineffective. As the Petition explains, "because DOE was considering the same appliance, the technical issues and market barriers are quite

similar. Therefore . . . DOE's analysis . . . is a reasonable proxy . . . ." Pet. 34, Pet'r's Excerpts 0095. No evidence suggests otherwise.

Industry opponents presented no reliable evidence that their suggested alternatives – tax credits, water markets, desalination – are preferable to the California Standards; there are no estimates of the costs or savings potential of such programs. *See, e.g.*, AHAM Resp. to Pet. 10-12, Pet'r's Excerpts 0175-0177; AHAM Br. 25-26. Moreover, the record demonstrates that financial incentives are expensive and cannot cover the entire market, that water markets are difficult to implement because water savings are not necessarily fungible, and that desalination is both expensive and energy-intensive. *E.g.*, Petition 9-12, 27-34, Pet'r's Excerpts 0069-0072, 0087-0094; Pet'r's Excerpts 0219-0020 (CUWCC); Pet'r's Excerpts 0312-0314 (San Diego County Water Authority).

Finally, the most important point about alternatives, which DOE ignores, is the sobering reality that California must pursue *all* feasible water supply and efficiency options – i.e., both the Standards and "alternatives." *E.g.*, Pet. 5, 15-19, Pet'r's Excerpts 0066, 0076-0080; *see also* Cal. Pub. Res. Code § 25008 ("the policy of the state [is] to promote all feasible means of energy and water conservation"); California Water Plan Update 2005 1-2, Pet'r's Excerpts 0297-0298 ("[b]y wringing every bit of utility from every drop of water, Californians

can . . . help ensure continued economic, social, and environmental health").[8] California's water suppliers are following this crucial policy, see pp. 22 *supra* & 25-26 *infra*, and the law and the record show that DOE should not stand in the State's way.

5. The Standards Are Needed.

Because DOE concluded (erroneously) that California did not show that it has "unique and compelling" water or energy interests, the agency found it unnecessary to determine whether the record shows that the RCW Standards are "needed," § 6297(d)(1)(B), to meet such interests. 71 Fed. Reg. at 78164, Pet'r's Excerpts 0146. The record is quite adequate to address the issue.[9]

AHAM suggests that a standard must be "central" and "critical" to a state's "extreme" problems, or "impossible to do without," in order to be "needed." AHAM Br. 10-12, 16, 17. But AHAM recognizes that "[a] range of definitions are recognized by courts as to what 'needed' or 'necessity' means." *Id.* 17. Under

[8] AHAM complains that the Standards are not expressly mentioned in the State Water Plan. AHAM Br. 12, 25. The only requirement concerning a state's water (or energy) plan is that alternatives be evaluated "within the context" of the plan. § 6297(d)(1)(C).

[9] Amici GAMA and ARI argue that one aspect of DOE's determination on "unusual and compelling interests," which was favorable to California, was unsupported. GAMA-ARI Br. 7-9. This is improper. GAMA and ARI sought amicus status in order to "urg[e] affirmance of the decision of the agency," Motion for Leave to File Brief of Amici Curiae, etc., 9 (Dec. 14, 2007), and they cannot now attack the Decision.

EPCA, a state must show that a standard is, as AHAM puts it, "impossible to do without" only if the state is asking for a waiver to take effect earlier than the ordinary three-year waiting period, in order to address an emergency. § 6297(d)(5)(B)(ii) ("regulation is *necessary* to alleviate substantially such [emergency] condition") (emphasis added). In contrast, to obtain an ordinary waiver (as California seeks here), the state is required to show only that "substantial and unusual . . . problems, such as high . . . prices . . . or adverse environmental . . . conditions . . . *can be* alleviated by . . . conservation in appliances." H.R. Rep. at 24 (emphasis added).

No matter how "needed" is parsed, the Standards meet the test. The people responsible for meeting California's water and energy needs – the State's water and energy utilities – unanimously said that the Standards are needed. *See*, *e.g.*, Pet'r's Excerpts 0236 (California Water Association, representing investor-owned water utilities, "crucial"), 0239 (PG&E, "desperately needed"), 0254 (ACWA, "essential"), 0266 (CMUA, representing publicly-owned water and energy utilities, "critical"); see also pp. 22, 24 *supra*.

Opponents suggest that DOE should have denied the petition because other efficiency measures, or supply sources such as desalination, might be capable of providing more water than the California Standards. E.g., AHAM Resp. to Pet. 10-

12, Pet'r's Excerpts 0175-0077; GAMA-ARI Br. 13-14. Not so. If the mere existence of any alternative (no matter how costly or environmentally damaging, see p. 23 *supra*), means that a standard is not "needed," then no petition can ever be successful. Congress did not intend such a result. *See* § 6297(d)(1)(C)(i)-(ii).

Finally, AHAM's arguments about industry impacts are irrelevant. See AHAM Br. 6-7, 25. No one challenged (either on reconsideration or in this Court) DOE's determination that the record did not support a conclusion that there would be any significant impacts on industry, 71 Fed. Reg. at 78167, Pet'r's Excerpts 0149 (and the record shows that any potential adverse impacts will be minimal, Rebuttal 7-12, Pet'r's Excerpts 0039-0044). Industry's arm-waving about its purported need for federal protection against a fearsome "growing patchwork" of "numerous conflicting state requirements," *e.g.*, AHAM Br. 14, is frivolous. California is the only state that has requested a waiver for RCW Standards, that even has RCW Standards, and that has ever submitted a waiver petition for any appliance since the current preemption provisions were enacted over twenty years ago.

B. EPCA's 3-Year Delay Rule Does Not Prevent DOE from Granting a Waiver.

EPCA establishes a three-year delay (five years in circumstances not present here) between the date DOE grants a waiver and the date on which a state standard

takes effect pursuant to the waiver. § 6297(d)(5)(A). DOE asserts that this provision prevented granting California's waiver, apparently on the ground that DOE's grant of a waiver, had it occurred, would have been in December 2006, and one section of California's appliance regulations indicates that the 8.5 WF Standards were nominally designated to effect on January 1, 2007. DOE Br. 9, 27.

DOE is wrong in asserting that under EPCA the agency was "unable to alter the effective date" or "determine an alternative effective date" for the Standards. DOE Br. 9, 15. DOE does not "alter" or "determine" effective dates at all. Nominal effective dates of a standard are set by the state adopting the standard, but the real effective date – the date on which manufacturers must comply with the standard – is set by EPCA: three (or five) years after DOE acts. § 6297(d)(5)(A).

DOE also misreads California law. Although each State appliance standard is adopted with a nominal effective date, California law also expressly provides that standards requiring waivers take effect only upon the effective date of a DOE waiver. Cal. Code Regs. tit. 20, § 1605(b). DOE ignores this.

DOE also ignores that the California Standards have two different nominal effective dates: January 1, 2007 for the 8.5 WF Standards, and January 1, 2010 for the 6.0 WF Standards. See, *e.g.*, DOE Br. 15, 28 ("the 2007 effective date"). Even if DOE's reading of the three-year rule were correct, it obviously would not have

prevented DOE from granting a waiver, in 2006, for the 2010 6.0 WF Standards. (This also renders moot DOE's misplaced concern, see DOE Br. 28, about the effect of "different effective dates" on California's cost-effective analyses.)

C. 6.0 WF Top-Loading Clothes Washers Exist Today.

California demonstrated that 6.3 WF top-loaders existed in 2006 and that industry trends indicated that top-loading models complying with the 6.0 WF Standard are quite likely to be available in 2010, when the Standard is scheduled to take effect. Pet. 46 & n.98, 49, Pet'r's Excerpts 0107, 0110; Rebuttal 13, Pet'r's Excerpts 0045; Pet'r's Excerpts 0245 (PG&E). DOE's Brief fails to respond to the key issue in this Court: the agency's reliance on the nonexistence of 6.0 WF top-loading washers in *2006* has no relevance to the potential unavailability of such models in *2010*. *See Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (agency decision is arbitrary and capricious where there is no "rational connection between the facts found and the conclusions made"). DOE's attempt to bolster its determination with the agency's so-called "expert judgment," DOE Br. 41, is purely a *post hoc* rationalization: nothing about DOE's so-called "familiar[ity] with the exigencies and difficulties of manufacturing and marketing appliances," *id.*, appears in the Decision. In fact, *6.0 WF top-loaders exist now* (even sooner than the CEC anticipated). *See* www.energy.ca.gov/appliances/appliance/excel_based_files/clothes_washers.

Finally, the Court should ignore industry's attempt to inject considerations of "horizontal-axis" and "vertical axis" technologies into the debate, AHAM Br. 5, GAMA-ARI Br. 14-15, for DOE did not rely on or even discuss such matters in the Decision. *See* 71 Fed. Reg. at 78167-68; *see also Lorion*, 470 U.S. at 743-44 (judicial review under the APA is "based on the record the agency presents to the reviewing court").

III. The Matter Should Be Remanded to DOE with Instructions to Grant the Waiver.

"Although the normal course of action when the record fails to support an agency's decision is to remand to the agency for additional investigation or explanation, both Supreme Court and Ninth Circuit precedent acknowledge the propriety of remanding with instructions in exceptional cases." *Sierra Club v. EPA*, 346 F.3d at 962 (internal quotation marks and citations omitted). DOE acknowledges this. DOE Br. 44. But DOE does not address the types of "exceptional cases" that will, as *Sierra Club* explains, justify a remand with instructions. Rather, DOE merely knocks down irrelevant strawmen from other cases. See DOE Br. 45.

Sierra Club holds that a remand with instructions is appropriate where "the record . . . has been fully developed, and the conclusions that must follow from it

are clear," so that "further administrative hearings would serve [no] useful purpose." 346 F.3d at 963. Such circumstances are present here.

DOE relied upon three rationales for denying the waiver: the 3-year rule, the alleged unavailability in 2010 of 6.0 WF top-loaders, and the alleged lack of data supporting the CEC's cost-benefit and alternatives analyses. E.g., DOE Br. 9-10, 15-16. The 3-year rule issue is purely a question of law, DOE has clearly erred, and this Court can and should interpret the statute correctly. See pp. 27-28 *supra*. The 6.0-WF-top-loader issue has disappeared, because there are top-loaders available today at 6.0 WF and less. See pp. 28-29 *supra*. That leaves only the alleged lack of data. The record clearly demonstrates that the RCW Standards are cost-beneficial, "necessary or preferable" in comparison to alternatives, and "needed" to meet California's "unusual and compelling" interests. Pp. 14-27 *supra*. Finally, DOE has conceded that "a grant of a waiver-preemption petition . . . would result in a final rule." DOE Br. 47. This Court can and should remand with instructions to DOE to adopt such a final rule.

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CONCLUSION

California's Legislature and Governor have directed the Energy Commission to adopt the clothes washer efficiency Standards at issue here, in order to help solve the State's ongoing water crisis. The State's water suppliers are doing all they can to meet their customers' needs, and they strongly agree that the Standards are necessary. "[EPCA] is . . . designed to ensure that States are able to respond with their own appliance regulations to substantial and unusual . . . problems, such as high . . . prices . . . or adverse environmental . . . conditions that can be alleviated by . . . conservation in appliances." H.R. Rep. at 24. This Court should not let DOE's arbitrary and capricious actions frustrate Congress's design.

January 28, 2008

Respectfully submitted,

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FORM 8.
CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-71576

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *And Attached to the Back of Each Copy of the Brief*

I certify that: (check appropriate option(s))

XXX 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/***reply***/cross-appeal brief is

* Proportionately spaced, has a typeface of 14 points or more and contains **6,983** words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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* This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is

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_____ _____
Date Signature of Attorney or Unrepresented Litigant

Case Name: CALIFORNIA ENERGY COMMISSION, Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY, and SAMUEL W. BODMAN, Secretary of Energy, Respondents
Case No.: 07-71576
Court: United States Court of Appeals for the Ninth Circuit

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 Ninth Street, Sacramento, California 95814. On January 28, 2008, I served the following:

PETITIONER'S REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 28, 2008, at Sacramento, California.

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